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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1039 80

JOHN G. GETZ, JR.,
Respondent,

7481 *vs.*

CITY OF HARVEY,
a municipal corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

JOHN J. DOWDLE,
Attorney for Petitioner.

A. O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.

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PREFACE.

NOTE: The Clerk of the District Court of the United States for the Northern District of Illinois certified the transcript of record in this case as being in accordance with designations filed in said Court with the exception of Items 6 and 7, of Appellant's Designation, and Exhibit "A" of Item 1, and Items 3 and 4 of Appellee's Designation, originals of which were certified to Circuit Court of Appeals in a previous appeal. (R. 132) Where reference is therefore made to Record page ...., reference will be to be record filed in case #7411, entitled *John G. Getz, Jr., Plaintiff-Appellant* v. *City of Harvey, a Municipal Corporation, et al., etc.*

IN THE

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OCTOBER TERM, A. D. 1940

No. .....

JOHN G. GETZ, JR.,

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7481 *vs.*

CITY OF HARVEY,
a municipal corporation,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, City of Harvey, a municipal corporation, organized and existing under and by virtue of the laws of the State of Illinois, respectfully prays for the issuance of a writ of certiorari herein directed to the United States Circuit Court of Appeals for the Seventh Circuit to review a certain final decision and opinion of said court rendered and filed in the above entitled cause on February 28, 1941. (R. 928.)

A petition for rehearing was filed by petitioners on March 14, 1941, within fifteen days after entry of judg-

ment in said cause, as prescribed by Rule 22 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947.)

An order denying the petition for rehearing, but modifying the opinion theretofore filed in said cause was entered in the United States Circuit Court of Appeals for the Seventh Circuit on April 7, 1941. (R. 965.)

This petition for the issuance of a writ of certiorari, together with supporting brief and a certified transcript of record are filed in this court within three (3) months after the entry of said order in the United States Circuit Court of Appeals for the Seventh Circuit denying said petition for rehearing.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity brought in the United States District Court for the Northern District of Illinois, Eastern Division, by John G. Getz, Jr., respondent herein, a citizen of the State of Michigan, against the City of Harvey, a municipal corporation of the State of Illinois, petitioner herein.

In this suit respondent alleges that he is the owner and holder of $243,000.00 par value water certificates of indebtedness of said City of Harvey, payable solely from revenues derived from the operation of a water works system of said City designated as Water Works System No. 2. Respondent claims that said certificates of indebtedness are legal and binding obligations of the City of Harvey; that petitioner has misapplied or otherwise illegally diverted some portion of the revenues derived from the sale of water by the City of Harvey and asks; for an

accounting of all moneys received or collected from the sale of water by the petitioner, City of Harvey, its officials and agents; that the proportionate share which is allocable to Water Works System No. 2 be determined from the moneys so collected; for judgment against the petitioner herein for such sums as are found to have been illegally diverted from a special water fund designated as Special Water Fund No. 2; for an order restraining the petitioner from diverting or in any other manner misapplying funds belonging to Special Water Fund No. 2 and for the appointment of a Receiver of all the property and assets of said Water Works System No. 2. (R. 14, 15)

Petitioner in and by its answer urges two grounds of defense to the charges made in the complaint. Firstly, that the water certificates of indebtedness allegedly owned and held by the respondent, John G. Getz, Jr., are invalid and void. Secondly, should the court find that said water certificates of indebtedness are valid, that they are non-negotiable instruments under the law of the State of Illinois, and therefore are subject to any existing rights and defenses, which defendant, City of Harvey, has or could interpose against A. C. Allyn & Company, who acquired said certificates pursuant to the terms of a written agreement with the City of Harvey, whereby said A. C. Allyn & Company agreed to refund all of the outstanding certificates of the City of Harvey. (R. 22)

The cause was referred to a Master in Chancery of the District Court, who, after extended hearings, rendered his revised and substituted report, in which he ruled that the petitioner, City of Harvey, was estopped to deny the validity of the water fund certificates of indebtedness of the City of Harvey, payable solely from the Special Water Works Fund No. 2, but allowed the alternative relief

prayed for by the petitioner, City of Harvey and ordered the respondent, John G. Getz, to deliver up to the Clerk of the District Court the said $243,000.00 par value certificates of indebtedness held by him to be in turn delivered to the City of Harvey upon the payment by said City of the sum of $173,000.00, which was the sum found to have been expended by said A. C. Allyn & Company in acquiring said certificates together with interest on said sum from the day and date the several certificates were acquired by said A. C. Allyn & Co.

All relief sought by respondent was denied and a decree was entered in the District Court in accordance with the findings of the Master, as set forth in his revised and substituted report. (R. 856 to 882)

THE APPEALS TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

From that part of the decree, requiring the respondent to deliver to the Clerk of the United States District Court the said $243,000.00 par value certificates of indebtedness for delivery to the City of Harvey, upon the payment by said City of the said $173,000.00 and interest thereon, the respondent filed his appeal, and thereafter, from that part of the judgment, holding that the City of Harvey was estopped to deny the validity of said certificates, the petitioner, City of Harvey, appeals.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936, entitled "An

Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes," and reading as follows:

> "Sec. 240. (a) In any case civil or criminal in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The special and important reasons advanced by the petitioner and addressed to the Court's judicial discretion are set forth under Point IV of this petition entitled "Reasons relied on for the allowance of the writ."

The Circuit Court of Appeals for the Seventh Circuit on February 28, 1941, reversed the order and decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed by Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 947)

The said petition for rehearing was denied and the original opinion filed by the court was modified by order of the court entered April 7, 1941. (R. 965)

The certified transcript of record, the Petition for the issuance of a Writ of Certiorari with the supporting brief annexed thereto are filed herein with the Clerk of this Court within three months after denial of the petition

for rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

III.

QUESTIONS PRESENTED.

(1) Whether a municipality may adopt an ordinance and thereby legally allocate some portion of an existing water fund to the payment of new certificates in a case where the existing water fund had been pledged by the provisions of a prior contract ordinance to the payment of previously issued and then outstanding certificates.

Whether such an allocation constitutes a mere procedural irregularity or whether the allocation is rendered void by reason of a statutory provision prohibiting such an allocation, and the constitutional inhibitions contained in Article 1, Section 10 of the Constitution of the United States and Article 2, Section 14 of the Constitution of the State of Illinois.

(2) Whether a court may by judicial interpolation expand an act of the legislature, so as to give the act an effect neither appearing in the act or reasonably to be inferred from the language of the act.

IV.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

The decision of the Circuit Court of Appeals for the Seventh Court in this case decided the following important questions of local law contrary to local decisions on similar questions; namely:

1. That the act of April 22, 1899, by implication authorized a municipality to build or acquire two or more water works systems; and that said act, by suggestion, authorized municipalities to create two water works systems by allocating some part of an existing water fund, which had been previously pledged, to the payment of new and additional certificates.

2. That the allocation of the previously pledged water revenues of Water System No. 1 to the payment of certificates of indebtedness of Water Works System No. 2, was a mere procedural irregularity, in the issuance of such certificates, which the City of Harvey was estopped to assert against the holders thereof, because the City had received some benefit.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of record of all proceedings in the case, numbered and entitled on its docket, No. 7481, *John G. Getz, Jr., Plaintiff-Appellee* v. *City of Harvey, a Municipal Corporation, Defendant-Appellant;* that said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further re-

lief in the premises, as to this Honorable Court shall seem meet and just; and your petitioners will ever pray.

CITY OF HARVEY, a Municipal Corporation,

Petitioner,

By JOHN J. DOWDLE,

Counsel for Petitioner.

ALBERT O. HOFFMAN,
WILLARD C. WALTERS,

Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion and modified opinion in the Circuit Court of Appeals for the Seventh Circuit are set forth in the transcript of record filed in this cause at pages 928 and 966 thereof.

The revised and substituted report of the Master in Chancery, to whom the cause was referred by the District Court, appears in the transcript of record at pages 856 to 882 thereof.

The decree entered in the District Court, adopting, approving and confirming the revised and substituted report of the Master, appears in the transcript of record at page 900 thereof.

The opinion rendered in the District Court in the form of a Memorandum appears in the transcript of record in case No. 7481 at pages 114 to 121 thereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this court is invoked by virtue of the provisions of Section 240(a) of the Judicial Code, as Amended, by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, entitled, "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit

Court of Appeals and the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the Seventh Circuit on February 28, 1941, reversed the order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed under the provisions of Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 948)

On the 7th day of April, 1941, the Circuit Court of Appeals for the Seventh District entered an order denying said petition for rehearing and by said order modified the opinion theretofore filed by the court. (R. 966) The certified transcript of record, the petition for the issuance of a writ of certiorari with supporting brief annexed thereto are filed herein with the Clerk of this court within three months after denial of the said petition for rehearing in the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are set forth in the preceding Petition for a Writ of Certiorari under Point I thereof, and in the interest of brevity are hereby readopted and made a part of this brief.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

1 (a). In holding that the act of April 22, 1899 (Appendix "A") authorized a municipality to create two water funds by allocating to each some portion of an existing water fund, notwithstanding that the existing water fund had been theretofore pledged under the terms and provisions of a contract ordinance and in spite of positive statutory provisions that the existing water fund was to be held inviolate for the purpose for which it was created and for no other purpose whatsoever.

(b) In holding that such an allocation does not contravene the provisions of Article 2, Section 14 of the Constitution of the State of Illinois, and does not contravene the provision of Article 1, Section 10 of the Constitution of the United States.

2. In holding that said Act of April 22, 1899, authorizes a municipality to acquire two or more water works "systems".

SUMMARY OF ARGUMENT.

I.

The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some Act of the General Assembly or it does not exist.

(a) Municipalities derive their existence and their powers solely from the General Assembly.

(b) Statutes which grant powers to municipal corporations, are strictly construed, and any fair or reasonable doubt of the existence of such powers is resolved against the municipality which claims the right to exercise them.

(c) Under the Act of April 22, 1899, the General Assembly provided the method whereunder the City of Harvey might enter into a contract for the acquisition of a water works system and the manner whereby it might issue water certificates of indebtedness and provide for the payment thereof. That method is exclusive and must be followed. If it is not observed, the contract is invalid and unenforceable.

II.

A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits.

ARGUMENT.

I.

The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some Act of the General Assembly or it does not exist.

The City Council of the City of Harvey, on August 4, 1924, passed Ordinance No. 852 "authorizing the City of Harvey to purchase the water distribution system and appurtenances of the Public Service Company of Northern Illinois for furnishing water in the City of Harvey, Illinois, and to provide for the cost thereof." (R. 684) Said ordinance was passed under and in accordance with an act of the General Assembly of the State of Illinois (R. 684) entitled "An Act authorizing cities, towns and villages to build, purchase or extend waterworks systems for public and domestic use, and to provide for the cost thereof," approved April 22, 1899, in force July 1, 1899. (Appendix "A")

By virtue of the ordinance of August 4, 1924, the City of Harvey availed itself of the provisions of said act of 1899, acquired its waterworks system from the Public Service Company of Northern Illinois, issued water certificates of indebtedness in payment therefor in the sum of $200,000.00 and created a "water fund". In adopting said Ordinance No. 852 the City of Harvey exercised all of the powers which the General Assembly of the State of Illinois, by said act of April 22, 1899, had conferred upon it. The City of Harvey was then under the legisla-

tive commandment that "the entire proceeds arising from the waterworks system shall be paid into a *fund* to be known as the 'Water Fund', and which *fund* shall be and remain *inviolate* until the certificates issued under the terms hereof and the interest thereon *is* fully paid". (Section 3, Act of 1899, Appendix "A") (Italics added)

The City of Harvey two years later and on the 20th day of September, 1926, passed an ordinance, entitled "Ordinance No. 954, approving plans for the construction of a waterworks system for public and domestic use in the City of Harvey, Cook County, Illinois, to be paid for by certificates of indebtedness limited in their payment solely to the water fund hereinafter provided for, and fixing the rate at which water is to be supplied therefrom". (R. 516)

Section 6 of said Ordinance No. 954 provides in part as follows (R. 520):

> "The total receipts of the City of Harvey from its present water distribution system and from its said Waterworks System No. 2 to be constructed as an extension of the present system shall be allocated to its Special Water Fund No. 1 and said Special Water Fund No. 2 in the proportion of the water supplied by each of said systems, as determined by the intake meters at the points at which each of said plants receive from the City of Chicago the supply of water distributed through the mains of each of said systems."

By the terms of said ordinance the City of Harvey undertook to allocate or assign some part of the funds arising from its present water distribution system to the payment of certificates which were to be issued to meet the costs of constructing Water Works System No. 2. The attempt to allocate any part of the revenues arising from the City's existing water distribution system was a violation of the legislative prohibition contained in said

Section 3 of the Act of April 22, 1899; it was an impairment of the contract obligation contained in Section 4 of said ordinance No. 852 whereunder Public Service Co. of Northern Illinois was given until fully paid a vested interest in the entire proceeds arising from the operation of the water distribution system which it had sold and transferred to the City of Harvey.

Article 2, Section 14, Constitution for State of Illinois.

Article 1, Section 10, Constitution of the United States.

Somewhere in the act of 1899 there must be found express language giving the municipality the power to create two water funds or to allocate revenues from one fund to another or the power does not exist.

A municipality must follow the manner provided by the legislature in issuing water certificates. This manner is exclusive and if it is not followed the contract is void and unenforcible. In the case of *City of Carlyle* v. *Nicolay,* 333 Ill. 562, at page 568 the Court says:

> "It is a general rule that when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated in the grant and not otherwise."

It is a well established principle of law that grants of powers to municipalities are to be strictly construed. The Supreme Court in the case of *Coquard* v. *Village of Oquawks,* 192 Ill. 355, at page 365, says:

> "This court, as well as the Supreme Court of the United States, has quoted with approval the rule laid down by Judge Dillon, in his work on municipal corporations, 'That a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words;

> second, those necessarily or fairly implied, in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.' (Cases there cited.) Any reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

It has been said by the Circuit Court of Appeals in this case:

> "Nor did the attempted allocation of the earnings from the two plants work any violation of the Act."

It is a fundamental principle of law that in construing statutes, words are to be given their usual and accepted meaning. Allocation, according to Webster's New International Dictionary, Second Edition, means: (1) "Act of putting one thing to another." Under this definition, if the revenues derived from the existing system are put to the payment of the certificates of the so-called water system No. 2, then the "water fund," did not "remain inviolate, until the certificates issued under the terms thereof were fully paid," as the Statute provides. (Sec. 3, Appendix)

The ordinance, attempting the aforesaid allocation, purports to be adopted in pursuance of the Act of April 22, 1899, and other acts of the State of Illinois pertinent to the subject matter. (R. 516)

Respondent fails to point out any act of the General Assembly of the State of Illinois, which authorized the construction of Water Works System No. 2.

The Circuit Court of Appeals in this case, in its opinion, states:

> "The act of July 8, 1927, which expressly provided for allocation of earnings of different systems, it

> seems to us, does not militate against the validity of these certificates under the act of 1899. The latter act did not repeal the first; it only created additional and more facile methods."

The court obviously overlooks the fact that the act of July 8, 1927, was not in existence on September 20, 1926, at the time of the attempted allocation, nor at the time of the issuance of the water certificates, payable out of the so-called Special Water Fund No. 2. It is not a validating nor curative act, nor could it be for the Supreme Court of the State of Illinois, in the case of *The People* v. *Orvis,* 374 Ill. 536 at 541, says:

> "It is settled that the General Assembly may, by statute, validate an irregular or defective exercise of a power where the power already existed and the proceeding sought to be cured was not one of the fundamentals of the power exercised. Conversely, the General Assembly cannot, by a curative act, make a void proceeding valid. (*People* v. *Southern Railway Co.,* 367 Ill. 389; *People* v. *Chicago and Eastern Illinois Railway Co.,* 365 *id.* 202; *People* v. *Padley,* 340 *id.* 314; *People* v. *Chicago, Milwaukee and St. Paul Railway Co.,* 321 *id.* 499; *Maulding* v. *Skillet Fork Drainage District,* 313 *id.* 216; *Roverts* v. *Eyman,* 304 *id.* 413.)"

The Circuit Court also says in its opinion (R. 942):

> "But the act authorizes cities to build, purchase or extend waterworks 'systems'. It does not forbid more than one system, but strongly suggests power to build, enlarge and pay for more than one system. It contemplates purchase or construction of a plant and in addition, extension or enlargement thereof, and expressly authorizes the city, in payment of the cost of such building, enlargement or extension, to issue water fund certificates, payable out of the proceeds arising from the operation."

The act of April 2, 1899, Section 1 thereof, provides as follows:

> "Every city, incorporated town and village in this State, is hereby authorized to acquire water works for supplying water for public use, and for domestic use of its inhabitants by building *or* purchasing a *water works system or* enlarging *or* extending *an existing system.* * * *" (Italics added.)

The court in its opinion misapprehends the language of the act of 1899 and applies the act as though the word system appears in the plural, whereas in fact, the word system appears in the singular throughout the body of the act, and appears in the plural only in the title of the act, where the words "cities, villages and towns" appear in the plural.

The application of the act of 1899, as though the word "system" appeared in the plural in the body of the act, led the court into the erroneous conclusion that said act of 1899 permitted two or more water "systems" and two or more issues of certificates to co-exist and that the "water fund" declared by the act to be inviolate might be divided and used for a purpose not contemplated by the ordinance creating the "water fund".

II.

A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits.

The Master and Chancellor in this case held that the City of Harvey was estopped to deny the validity of water fund certificates #2, based upon the fact that said city had made frequent payments on both the principal

and the interest coupons of said certificates. The petitioner contends that a municipality is a creature of the legislature; that it possesses only those powers which the legislature conferred upon it, and that where a municipality lacks the power to perform the act sought to be done, it can not be estopped to deny the validity of that act regardless of the subsequent conduct or acts of such municipality.

The case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, and *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101, sustain the contention that a municipality can not be estopped to deny the validity of an act which it had no power from the legislature to perform, regardless of what was done by the municipality subsequently thereto. The court in the *Bolton* case, says:

> "Nor did the city, either by the payment of interest or of a small amount on the principal of the originals, ratify the instant obligations. *Feldman* v. *City Council of Charleston* (1885), 23 S. C. 57, 69, 70, 55 Am. Rep. 15, seems decisive of this point against the defendant holder. There, the City of Charleston by an ordinance, which was subsequently ratified by the Legislature, issued its bonds to secure funds to lend to landowners, whose property had been damaged during a fire which swept the city. Thereafter the city made payments on such bonds. Held, since bonds were issued for no corporate purpose, there could be no estoppel against the city by virtue of part payment. Neither can the payment of interest, even if of long continuance, upon bonds of a municipality validate them by ratification or estoppel. (*Clarke* v. *Northampton* (C. C. A. N. Y. 1903), 120 F. 661, 57 C. C. A. 125, certiorari denied 189 U. S. 513, 23 S. Ct. 852, 47 L. Ed. 924; note L. R. A. 1915A, 11); nor renewals of an invalid obligation translate it into a valid one (*Luther* v. *Wheeler, supra*)." 163 S. C. 242; 86 A. L. R. 1101.

The petitioner City of Harvey denied the validity of water certificates of indebtedness #2 because it lacked the power to issue them. Neither the Master nor the Chancellor made a finding as to the validity or invalidity of said certificates, but made a finding only that the City was estopped to deny them by reason of its subsequent conduct in making principal and interest payments. The Circuit Court of Appeals for the Seventh Circuit affirms this view.

The petitioner respectfully submits that a Writ of Certiorari should be granted in order that this court may review the judgment of the Circuit Court of Appeals in the exercise of its supervisory powers.

Respectfully submitted,

JOHN J. DOWDLE,
Counsel for Petitioner.

ALBERT O. HOFFMAN,
WILLARD C. WALTERS,
Of Counsel.

APPENDIX "A".

AN ACT *authorizing cities, towns and villages to build, purchase or extend water works systems for public and domestic use and to provide for the cost thereof.*

Approved April 22, 1899. In force July 1, 1899. L. 1899, p. 104.

¶ 1087. CITIES, ETC., MAY ACQUIRE WATER-WORKS—PAYMENT FOR, HOW MADE.] Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* Every city, incorporated town and village in this State, is hereby authorized to acquire water works for supplying water for public use, and for domestic use of its inhabitants by building or purchasing a water works system or enlarging or extending an existing system. In payment for such building, purchase or enlargement any such municipality may issue certificates of indebtedness limited in their payment solely to the water fund hereinafter provided for; such certificates may bear interest at a rate of not exceeding six per centum per annum, payable semi-annually, and shall only be issued at not less than par value in payment for the building, purchase or extension of a water works system.

¶ 1088. HOW TO AVAIL OF ACT.] § 2. Any such municipality desiring to avail itself of the provisions of this act shall first pass an ordinance fixing in a general way the capacity of the water works system it is proposed to acquire, and referring to the plans and specifications therefor which shall be open to the inspection of the public; which said ordinance shall fix the rates at which water is to be supplied for all private purposes, and

said rates so fixed, shall not thereafter be reduced until the certificates issued for acquiring or enlarging the water works, and the interest thereon, are fully paid. Which said ordinance shall be published in a newspaper published in such municipality at least one in each week for three successive weeks. And if no petition shall be filed with the clerk of such municipality as hereinafter provided, within twenty-one days after the first publication of said ordinance, then the corporate authorities may proceed to carry out the provisions of the ordinance. But if within said period of twenty-one days there shall be filed with the clerk of such municipality a petition, signed by twenty per cent of the number of voters voting for presiding officer of the legislative body of such municipality at the next preceding general city, town or village election, asking that the question of acquiring or enlarging a water works system be submitted to a vote, It shall then be the duty of the legislative body of such municipality to call a special election in the manner provided by law to vote upon such question, and if it appear that a majority of the voters voting upon such question at such election vote in favor of acquiring or enlarging the water works, then said ordinance shall be in full force and effect and the corporate authorities may proceed to carry out the provisions thereof, but if a majority of the votes cast are against such acquiring or enlarging, then said city, incorporated town or village shall proceed no further for the period of six months next ensuing.

¶ 1089. PROCEEDS OF OPERATION, HOW EMPLOYED.] § 3. Whenever any such municipality shall avail itself of the provisions of this act, the entire proceeds arising from the operation of the water works system thereof shall be paid into a fund known as the "water fund" and which fund shall be and remain inviolate until the cer-

tificates issued under the terms hereof and the interest thereon is fully paid, and the treasurer of such municipality shall not pay any warrants drawn on said fund unless the same be drawn in payment of the necessary operating expenses of such water works system, or in payment of the certificates issued hereunder or the interest thereon.

¶ 1090. MORTGAGE OF WATER-WORKS.] § 4. In order to secure in the most ample manner the payment of the water certificates authorized as aforesaid, any such municipality may convey by way of mortgage or deed of trust the water works system so acquired or enlarged which said mortgage or deed of trust shall be acknowledged and recorded in the same manner as mortgages of real property, and which mortgage or deed of trust may contain such provisions and conditions as are reasonably necessary to fully secure the payment of said water certificates.

¶ 1091. DEFAULT IN PAYMENT OF WATER CERTIFICATES—FORECLOSURE—SOLICITOR'S FEE—DECREE—SALE—RIGHTS AND DUTIES OF PURCHASER.] § 5. Whenever, and as often as default shall be made in the payment of water certificates issued as aforesaid, and such default shall continue for the space of ninety days. It shall be lawful for said mortgagee or trustee to declare the whole of the principal and interest of such certificates at once due and payable, and proceed to foreclose the same in any court of competent jurisdiction, and in any degree to be rendered in such suit of foreclosure there shall be included a reasonable solicitor's fee for the complainant's solicitor, and such decree shall fix reasonable rates for water furnished from said water works system for public uses during the time that such municipality shall be deprived of the possession thereof as hereinafter provided, and upon any sale under such decree of fore-

closure the person or corporation offering to satisfy said decree for the rents, incomes and profits of said water works system for the least number of years not exceeding fifty, shall become the purchaser thereof, and on satisfying said decree shall be let into the use, occupation and enjoyment of said water works system during the period of time for which the same were sold, and during such period such purchaser or assigns shall be entitled to receive and collect for water furnished for private uses the rates prescribed in the ordinance provided for in section 2 of this act, and shall be entitled to receive and collect the reasonable rates fixed for the public uses of water in such decree. At the end of said period said purchasers or assigns shall deliver said water works system to such municipality in as good condition as when the same was received, ordinary wear and tear excepted.

¶ 1092. LIMITATION UPON POWERS OF MUNICIPALITY AND PURCHASER AT FORECLOSURE SALE.] § 6. During the period of time when the purchaser at such foreclosure sale shall be entitled to the use and enjoyment of said water works system, it shall not be competent for such municipality to construct or authorize any other person or corporation to construct a competing system of water works, nor shall it be competent for the purchaser at such foreclosure sale, or assigns, to extend the water works system so purchased, except upon such terms as such municipality may authorize.

¶ 1093. CONSTRUCTION.] § 7. This act shall be deemed and construed to confer powers in addition to, but not limiting, those now existing.

(20)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. [redacted] 80

JOHN G. GETZ, JR.,
Respondent,

7481 *vs.*

CITY OF HARVEY,
a municipal corporation,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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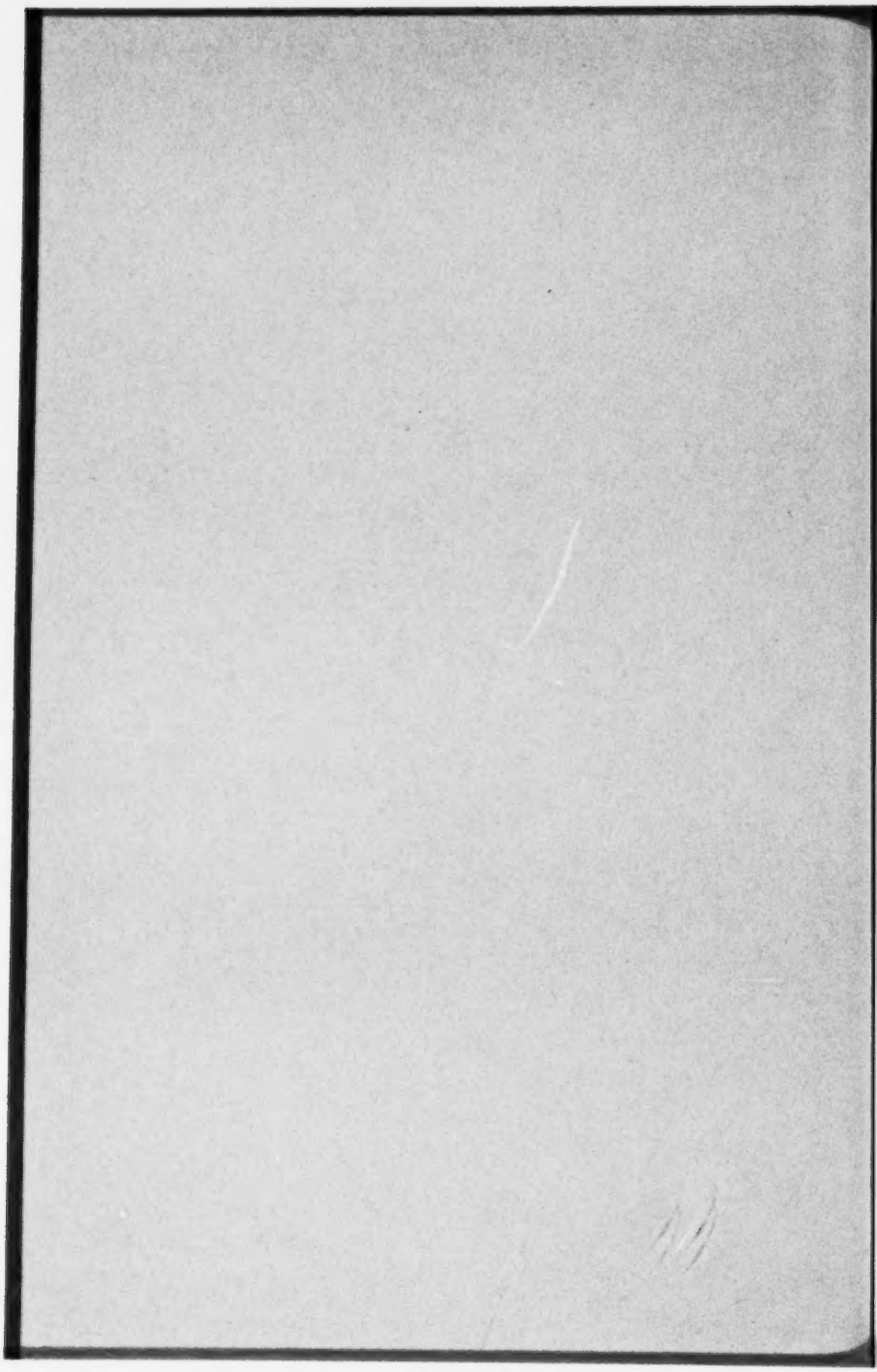

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 1039

JOHN G. GETZ, JR.,
Respondent,

7481 *vs.*

CITY OF HARVEY,
a municipal corporation,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

MAY IT PLEASE THE COURT:

The petitioner, City of Harvey, a municipal corporation, in the County of Cook and State of Illinois, organized under the commission form of municipal government of the Cities and Villages Act of the State of Illinois, prays for the issuance of a writ of certiorari directed to

the United States Circuit Court of Appeals for the Seventh Circuit to review that court's final decision and opinion relating to case No. 7481.

We respectfully submit that the only question presented is whether the City of Harvey was authorized under the provisions of the Act of April 22, 1899, to extend its existing waterworks system and to pay for such extension by the issuance of water fund certificates payable out of the proceeds arising from the earnings of the system as extended.

The master, the District Court, and the Circuit Court of Appeals each held that the certificates relating to Water Work System No. 2, being an extension of the existing system, were legal, valid and binding obligations payable out of the earnings of the water fund. The decision reached by each of the aforesaid was based on the same findings of fact.

> "Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error be shown. (Citing cases.) No such error is shown before us."
>
> *Bodkin* v. *Edwards,* 41 S. Ct. Rep. 268, 269; 255 U. S. 221, 223.

In their conclusions of law each of the aforesaid followed the decisions of the Illinois Supreme Court and the Illinois Appellate Court.

Jurisdictional Grounds.

Petitioner seeks to invoke the jurisdiction of this Court by virtue of the provisions of Section 240a of the Judicial Code, as amended. Petitioner, however, has failed to show any jurisdictional grounds as required by Rule 38, Subsection 5 (b) of the Rules of the Supreme Court of the United States.

The decision of the Circuit Court of Appeals is in strict conformity with the decisions of the Illinois Supreme and Illinois Appellate Courts.

Neither in the objections of petitioner to the Master's report (Tr. 86) nor in the Statement of Points relied upon in its appeal to the Circuit Court of Appeals (Tr. 125), nor in the contested issues stated in its brief in the Circuit Court of Appeals, was any question raised regarding the impairment of contract guaranteed by Article 2, Section 14 of the Constitution of the State of Illinois and Article 1, Section 10 of the Constitution of the United States. The facts in this case clearly establish that there was no impairment of the first issue water fund certificates either by the ordinances passed by the City of Harvey or in the allocation of the earnings of the Water Department. The injection of the alleged constitutional question at this time is obviously for the sole purpose of attempting to raise a federal question so as to invoke the jurisdiction of this Court.

SUMMARY OF ARGUMENT.

I.

Respondent's reply to petitioner's proposition:

"The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some act of the General Assembly or it does not exist."

A. The contention of the City of Harvey that it had no statutory power to extend or enlarge its water works system and to pay for such extension or enlargement by water fund certificates is based on the proposition that the City, having used the provisions of the Act of April 22, 1899, for purchasing the original system, it can no longer avail itself of the provisions of the Act for enlarging or extending that system.

1. The City of Harvey, on August 4, 1924, passed an ordinance in pursuance of the provisions of the Act of April 22, 1899, for the purchase of a water works system owned by the Public Service Company of Northern Illinois, payment of which was made by issuing water fund certificates of indebtedness in the sum of $200,000.00.

2. The City of Harvey, on January 31, 1927, passed an ordinance in pursuance of the provisions of the Act of April 22, 1899, for the enlargement and extension of its then existing water works system, payment of which was made by issuing water fund certificates of indebtedness in the sum of $350,000.00.

3. The City of Harvey, in the recitals of the ordinance approving plans for the construction of an enlargement or extension of its present system, declared that the duly constituted public authorities of the City had determined to avail themselves of the provisions of the Act for that purpose.

B. The City of Harvey, for the purpose of allocating the proportion of the moneys received and collected by the City as water rates for the consumption and the use of water for any and all purposes, designated a Special Water Fund No. 1 and a Special Water Fund No. 2.

1. The ordinances and the trust deed provided that the net proceeds were to be apportioned on the basis of the amount of water pumped through the respective systems. Intake meters were to be installed for that purpose.
2. The evidence shows no intake meters were installed to measure the water purchased from the City of Chicago; neither were any records kept pertaining to either special water fund.
3. The total net profits for the years 1924 to 1938 amounted to $744,633.84. Based on the average earnings of Water Works System No. 1, the total net profits allocable to System No. 1 amounted to $388,901.77; to System No. 2, $355,732.07.
4. The total principal and interest matured relating to System No. 1 amounted to $232,350.00. Only $175,225.00 was paid leaving in default principal and interest of $57,125.00.
5. The total principal and interest matured relating to System No. 2 amounted to $266,100.00. Only

$129,675.00 was paid, leaving in default principal and interest of $136,425.00.

6. Had the total principal and interest matured relating to both systems, amounting to $498,450.00 been paid out of the net earnings amounting to $744,633.84, there still would have been a surplus of $246,183.84 available for application on unmatured certificates.

C. The Act of April 22, 1899, as expressed in its title, authorizes a municipality not only to build or purchase a waterworks system, but also to extend an existing waterworks system.

1. Sections 1, 3 and 4 of the Act specifically provide that water fund certificates of indebtedness may be issued to pay for enlarging or extending an existing system, and that these certificates shall be paid out of the entire earnings.

2. The court in its opinion did not misapprehend the language of the Act of 1899 by considering words used in the singular as also being in the plural. Under the Illinois statutory rules of construction words importing the singular number may extend and be applied to several persons and things. (Ch. 131, Sec. 1, Subd. 3rd, Ill. Rev. Stats. 1939.)

3. The cases of *Ward* v. *Chicago,* 342 Ill. 167, and *Maffit* v. *Decatur,* 322 Ill. 82, have overruled the decision in the case of *Joliet* v. *Anderson,* 194 Ill. 457. These later cases hold that the entire net proceeds of the Water Department may be used to pay all outstanding securities.

4. The Circuit Court of Appeals in *Connett* v. *City of Jerseyville,* 96 Fed. (2d) 392, held that the Act of April 22, 1899, manifests an intention to protect the certificate holders by all reasonable means.

5. The case of *Simpson* v. *Highwood,* 372 Ill. 212, again approves the rule that the income from presently owned property, as well as that newly acquired, is properly used to pay outstanding water certificates, bonds, or contractual obligations.

II.

Respondent's reply to petitioner's proposition:

"A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits."

A. The case of the *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, cited by petitioner, is a case where the municipality did not conform to the requirements of the statute and issued bonds without the approval of a majority of the voters. Under these circumstances, the Court held the bonds void.

B. The case of *Bolton* v. *Wharton,* 163 S. C. 242, cited by petitioner, is a case where the municipality issued notes for promoting a silk mill. There was neither constitutional nor statutory authority for their issuance,—the notes were not issued for a corporate or public purpose.

C. The City of Harvey has always regarded the certificates issued in relation to Water Works System No. 2 as valid obligations.

1. The City so declared in the refunding ordinance.
2. The first time the legality of these certificates has been challenged is in the present lawsuit.

3. It would be unjust to permit the City of Harvey, by mere technical quibbling, to declare the certificates relating to System No. 2 invalid and in this manner enrich itself by taking System No. 2, representing an investment, made in good faith by the certificate holders, in the sum of $350,000.00, and by keeping the earned revenue in the sum of $355,832.07—trust funds—collected for the benefit of the certificate holders.
4. Petitioner has failed to show that the water fund certificates issued in payment of Water Work System No. 1 have been impaired in any manner whatsoever so as to invoke the jurisdiction of this Court for the purpose of reviewing the decision of the Circuit Court of Appeals for the Seventh Circuit.

D. The Master and the District Court sustained the validity of these water fund certificates on the theory of estoppel. The Circuit Court of Appeals held that the issuance of the certificates came within the purview of the Act of April 22, 1899 and also sustained their validity on the theory of estoppel.
   1. The case of *People* v. *Maxon,* 139 Ill. 306, holds that a municipality, having permitted third persons to take affirmative steps under an ordinance, would be estopped to deny the validity of that ordinance.
   2. The Circuit Court of Appeals in *Burlington* v. *Murphysboro* 96 Fed. (2d) 899, held that the trustee municipality would be estopped to set up its own wrongdoings.
   3. The Appellate Court of the State of Illinois, in *Cook* v. *City of Staunton,* 295 Ill. App. 111, also laid down the rule that a municipality will be estopped to set up as a defense its own irregularities in the execution of a power clearly granted.

ARGUMENT.

I.

Respondent's reply to petitioner's proposition:

> *"The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some act of the General Assembly or it does not exist."*

Petitioner's contention appears to be that since the Act of April 22, 1899, refers to a "water fund" it must be concluded that the Legislature intended and authorized but one water fund and one issue of certificates. We believe that the construction of the Circuit Court of Appeals of the Act of April 22, 1899, is a reasonable one and follows the construction placed upon that Act by the Supreme Court of the State of Illinois. The title of the Act authorizes cities, towns and villages "to build, purchase *or extend water works systems* for public and domestic use and to provide for the cost thereof." Obviously, the title of the Act suggests not a single system but *several systems.* The title not only contemplates the purchase of a water works system but also the *extension of an existing water works system.*

In Section 1 the Act states:

> "Every city, incorporated town and village in this state, is hereby authorized to acquire water works for supplying water for public use, * * * by building or purchasing of a water work system or *enlarging or extending an existing system.*"

This section further states:

> "In payment for such building, purchase *or enlargement* any such municipality *may issue certificates of indebtedness* limited in their payment solely to the water fund hereinafter provided for * * * and shall only be issued at not less than par value in payment for the building, purchase *or extension of a water work system.*"

In Section 3 it is provided:

> "Whenever any such municipality shall avail itself of the provisions of this act, *the entire proceeds* arising from the operation of the water works system thereof shall be paid into a fund known as the 'water fund' * * *."

Under Section 4 it is provided:

> "In order to secure in the most ample manner the payment of the water certificates authorized as aforesaid, any such municipality may convey by way of mortgage or deed of trust the water works so acquired, *or enlarged* * * *." (Italics ours.)

In the instant matter the City of Harvey, on August 4, 1924, passed Ordinance No. 852 which authorized the purchase of a water system owned by the Public Service Company of Northern Illinois (Tr. 684).* It was expressly provided in this ordinance as follows:

> "Any pipes, mains or extensions, which may hereafter be laid by said City, and which may be connected with said water distribution system, shall not be deemed to be a part of said distribution system, * * *." (Tr. 696.)*

On September 20, 1926, the City of Harvey passed Ordinance No. 954 (Tr. 516)* which was an ordinance approving plans for the construction of an enlargement or extension of its present system. On January 31, 1927, the City of Harvey passed Ordinance No. 976 (Tr. 505)*

* Reference hereafter is to transcript in case No. 1038.

authorizing the issuance of $350,000.00 water fund certificates for payment of the enlargement to the present system. The enlargement was designated as Water Works System No. 2. On the same day the City of Harvey passed Ordinance No. 974 (Tr. 524) which was an ordinance allocating the water revenues of the City of Harvey and creating two special water revenue funds. In the recital of this ordinance, after referring to the ordinance passed on September 20, 1926, it is stated:

> "And Whereas Also the said City of Harvey now owns and operates a water supply system designated as Water Supply System No. 1, *wholly inadequate in its capacity to serve the necessities of the City of Harvey;*
>
> "Now, therefore, be it ordained by the City Council of the City of Harvey, Illinois;
>
> "Section 1. That on and after the completion, acceptance and beginning of operation of Water Works System No. 2 all of the moneys received and collected by the City of Harvey as water rates and for the consumption and the use of water for any and all purposes be allocated to Special Water Fund No. 1 and to Special Water Fund No. 2 in the same proportion as the amount of water pumped into and through Water Works System No. 1 bears to the amount of water pumped into and through Water Works System No. 2, as shown by the intake meters to be maintained at said water works respectively.
>
> "Section 2. The moneys so to be deposited in said Special Water Fund No. 2 shall remain forever inviolate for the payment of the cost of operation and maintenance of said Water Supply System No. 2 and for the payment of the principal and interest of said Water Fund Certificates of Indebtedness and for no other purpose so long as any of said certificates remain unpaid" (Tr. 524-525). (Italics ours.)

Section 3 provided that that proportion of the total revenue which was to be deposited in Special Water Fund

No. 1 was to be used exclusively for the payment of the cost of operation and maintenance of Water Supply System No. 1, and for the payment of the remaining outstanding portion of an issue of water certificates of indebtedness issued for the purchase of Water Supply System No. 1. Section 3 then specifically provided as follows:

> "* * * and no part of said Special Water Fund No. 1 nor any part of the income arising from said Water Supply System No. 1 shall be used or is intended to be pledged for the payment of any part of the cost of operation or maintenance of said Water Supply System No. 2 or for the payment of any part of the principal or interest of the Water Fund Certificates of Indebtedness above referred to" (Tr. 525).

On April 8, 1927, the City of Harvey, by its Mayor, and attested by its City Clerk (Tr. 504), executed a mortgage deed of trust dated February 1, 1927, conveying to the Chicago Trust Company, as Trustee, the specific property known as Water Works System No. 2 (Pl. Ex. 1, Tr. 480). The cost of Water Works System No. 2 was $350,000. Water fund certificates in that amount were issued maturing over the period from February 1, 1931, to February 1, 1956 (Tr. 482). Under the covenants of the trust deed appears the following:

> "Ninth: The City further covenants and agrees that all the water revenues of the City shall be allocated to Special Water Fund No. 1 and to Special Water Fund No. 2 created by said ordinance passed January 31, 1927, in the proportion that the amount of water pumped into and through Water Works System No. 1 bears to the amount of water pumped into and through Water Works System No. 2 as shown by the intake meters to be maintained at said water works respectively and that the reading of said meters shall be checked in proportion as the area of the supply pipe to Water Works System No. 1 bears to the area of the supply pipe to Water Works System No. 2" (Tr. 497).

All of the water used or sold by the City of Harvey is purchased from the City of Chicago. Therefore, to determine the amount of water coming from the City of Chicago and passing through each of the systems the foregoing ordinances and trust deed provided for the installation of two separate meters. The evidence, however, discloses that the City of Harvey never installed a meter for System No. 1 or a meter for System No. 2. Only a single intake meter was installed (Tr. 261). Mr. Nugent, public accountant, testified that the Water Department did not keep any records pertaining to either special water fund No. 1 or special water fund No. 2 (Tr. 261). Consequently, the only method for allocation of the water funds that could be made from the records was based on the average earnings of Water Works System No. 1 during the period when it operated alone. The records show that during the two years that Water Works System No. 1 was operating by itself, the net earnings for the year 1924 amounted to $27,884.27, and for the year 1925 amounted to $25,297.16. The average earnings of Water Works System No. 1 based on these figures, were $26,591.71 annually. Plaintiff's Exhibit 415 (Tr. 667) shows the allocations of the net profits for each year to Water Works Systems No. 1 and No. 2. The totals are as follows:

Total net profits for the years
1924 to 1938, inclusive.....$744,633.84

Total net profits allocated to—
System No. 1 ..... 388,901.77
System No. 2 ..... 355,732.07 (Tr. 667).

The allocation of $388,901.77 as the net earnings of Water Works System No. 1 is eminently fair inasmuch as Water Works System No. 1 had been used previously for

many years and it is reasonable to assume that this system which was already deficient in 1924 and 1925, as declared by the City Council of the City of Harvey, became more inefficient as time went on. Thus, by allowing the net earnings as of the early dates to the whole period of time, it is not in any sense detrimental to the earning powers of Water Works System No. 1. Furthermore, this sum was more than adequate to meet principal and interest of the water fund certificates issued and made payable out of the funds earned by Water Works System No. 1.

The total principal matured to April 30, 1939, on the water fund certificates relating to Water Works System No. 1, amounted to $122,000; the interest coupons matured amounted to $110,350, or a total of principal and interest amounting to $232,350 (Tr. 623). The net earnings as shown above, allocated to Water Works System No. 1, total $388,901.77. Had these certificates been paid in full, a surplus of $156,551.77 would still have been available to be used in retiring unmatured water fund certificates relating to Water Works System No. 1. However, the evidence shows that the City of Harvey had paid only $175,225 toward the matured principal and interest, leaving in default as of April 30, 1939, $52,000 of principal of the water fund certificates and $5,125 of interest coupons matured, or a total of $57,125 (Tr. 623).

$355,732.07 was allocated to Water Works System No. 2. This sum was likewise far in excess of the requirements necessary to meet the principal and interest of the water fund certificates and coupons matured as of April 30, 1939, relating to Water Works System No. 2. The principal matured as of that date was $45,000, and the interest coupons matured amounted to $221,100, or a total of principal and interest of $266,100. Since $355,-

732.07 was available to meet the total sum of $266,100 for principal and interest, it is apparent that if these obligations had been paid there still would have remained a surplus of $89,632.07 which could have been applied toward the retirement of unmatured water fund certificates relating to Water Works System No. 2. The record, however, shows that only $129,675 was paid on principal and interest, thus leaving in default $30,000 of principal of the water fund certificates and $106,425 of interest coupons, or a total of $136,425 (Tr. 623).

It is quite apparent that the City Council of the City of Harvey at the time Water Works System No. 2 was in contemplation of construction and at the time the water fund certificates were issued, gave adequate consideration to the allocation of funds so that nothing detrimental would result to the water fund certificates that had been issued to pay for the purchase of the original system. Had intake meters been installed to each of the water mains of the respective systems, the basis of allocation provided for would have been a proper method of determining the amount of water passing through each system. Obviously, Water Works System No. 2 was not only necessary to increase the supply of water for public and domestic use, but as shown by the records of the Water Department of the City of Harvey, the actual income in most years was more than doubled.

As heretofore pointed out, when Water Works System No. 1 was operating alone, the net profit for the year 1924 was $27,884.27, and for the year 1925, $25,297.16. Immediately upon the beginning of operations of Water Works System No. 2, the net profits rose for the fiscal year 1926 to $44,686.03; in 1928 to $65,316.88, and in 1929 to $88,775.36. Had Water Works System No. 1 operated alone during the whole period of time involved in this

proceeding, the Water Department of the City of Harvey could have earned no more than $388,901.77 instead of $744,633.84, which it did earn by the combined systems.

Surely, the legislature did not intend, as counsel for appellant argues, that the entire proceeds arising from the operation of the combined water works systems could be used only to pay for the original system, where that system had been enlarged and extended so as to double its earnings. If counsel's theory were to prevail, it is manifest that the increased earnings in the sum of $355,-732.07 which resulted by reason of the increased capacity of Water Works System No. 2 would be available only for payment of the certificates first issued, and any certificates subsequently issued to pay for enlargements or extensions would be, as he states, invalid and void. Thus, under this line of reasoning, instead of Water Works System No. 1 having a water fund of $388,901.77, it would have a fund of $744,633.84 obtained, not by reason of the earnings of that system, but because of the earnings of System No. 2. The injustice of such a situation to the holders of water fund certificates relating to System No. 2 is so apparent that further argument seems wholly unnecessary. However, in the recent cases decided by the Illinois Supreme Court, the contention that the earnings of a water system must be limited solely to the payment of the certificates first issued has been repudiated.

The contention that the proceeds of a water works system cannot be pledged for the payment of subsequently issued water fund certificates is based by its proponents on the decision in the case of *City of Joliet* v. *Alexander*, 194 Ill. 457. That case, however, has been distinguished by the Illinois Supreme Court in the case of *Ward* v. *City of Chicago*, 342 Ill. 167, 173; and the ruling in that case was followed by the Circuit Court of Appeals in the

case of *City of Jerseyville* v. *Connett,* 49 Fed. (2d) 246. The Illinois Supreme Court in the *Ward* case, after having referred to the *City of Joliet* v. *Alexander* case, on page 174 stated the following:

> "* * * Counsel for appellant in the present case lay considerable stress upon certain language of the opinion to the effect that indebtedness within such constitutional prohibition may be created by pledging an existing income of the city, arguing that in the present case there can be no way of determining how much income would be attributable to the enlargement of the system when made or how much would be attributable to the new rates to be put into effect; that the so-called new income cannot be segregated from the present income; that the present income will thereby be taken away and lost, and that so cutting off and pledging it will create an indebtedness within the meaning of the language invoked. The position thus taken seems to be that pledging the water fund creates indebtedness within the contitutional prohibition unless the pledge is confined to such precise income as can be directly traced to the particular new physical element of the plant to pay for which the obligation secured was issued, leaving the original income in effect intact and usable by the city for other purposes altogether. *The Decatur case is decisive against the soundness of such a position. There the income from the original plant was in effect cut off and lumped into the fund resulting from the operation of the plant as enlarged.* It is not apparent that any effort was there made to preserve such original income intact or exempt it in any manner or degree from the claim of the water company, or that moneys made available to the water company under the contract were at all limited to income traceable to the elements of the plant which it had financed." (Italics ours.)
>
> *Ward* v. *City of Chicago,* 342 Ill. 167, 174.

The record in the case at bar indicates that full consideration was given by the City Council of the City

of Harvey to the allocation of the respective proportions of the net income to each of the water works systems. That such allocations were not made was due to the fault of the officials of the City of Harvey and is not chargeable to the certificate holders. However, in view of the foregoing statement by the Illinois Supreme Court, the fact of allocating the funds to each system is immaterial since the entire proceeds have been held by the Court to be available for the payment of all outstanding water fund certificates. In all the recent cases before the Illinois Supreme Court involving water fund certificates or bonds, the Court has liberally construed acts of the legislature which authorize the building, purchase, enlargement or extension of water works systems and the Court has refused to uphold any technical interpretations which seek to defeat the payment of just obligations that have been issued by municipalities for the payment of such water works systems, extensions or enlargements.

The Circuit Court of Appeals in construing the object of the Act of April 22, 1899, in the case of *Connett* v. *City of Jerseyville,* 96 Fed. (2d) 392, on page 398 stated the following:

> "* * * The object of the Act was for the benefit of the public, in this particular case for the benefit of Jerseyville. It not only authorized appellee to construct a much needed water system, but it provided means by which it could establish a sufficient credit with which to finance the project. Without the latter the former would be of no avail. Without protection to the moneylender the latter could not be accomplished. *With this thought in view the entire Act clearly manifests an intention to protect the certificate holders by all reasonable means until the certificates are fully paid.*" (Italics ours.)
>
> *Connett* v. *Jerseyville,* 96 Fed. (2d) 392, 398.

It is quite inconceivable that this Court or any Court would construe the Act of April 22, 1899, to mean that a municipality, once having used the Act to authorize the purchase of a water works system and to pay for that system by issuing water fund certificates, that thereafter, the municipality could not again avail itself of the Act to enlarge that system until the first indebtedness had been paid. The Act of April 22, 1899, specifically contemplates growth and expansion. A municipality is authorized to build or purchase a water works system and then, as the municipality grows and its needs increase, extensions or enlargements to its existing system are specifically authorized. The facts in the case at bar show the common sense application of the powers authorized by the Act of April 22, 1899. The growth of the City of Harvey and the need for additional facilities is proved by the increased revenue earned by the combined systems. This increased revenue, as the evidence shows, was more than adequate to pay the water fund certificates, principal and interest of both systems, as they annually matured.

Petitioner contends that the allocation of the water revenues as provided by ordinance No. 974 of the City of Harvey was not authorized by Section 3 of the Act of April 22, 1899 (Pl. Ex. 3, Tr. 524). Since the ordinance was entirely ignored by the officials of the City of Harvey and no allocation was made whatsoever pursuant to the provisions of that ordinance, it is unnecessary to consider whether or not the allocation or assignment was proper. The allocation made by the accountant, as we have heretofore indicated, more than protected the rights of the certificate holders whose certificates related to Water Works System No. 1. Furthermore, the Circuit Court of Appeals has only followed the rule of the

Illinois Supreme Court approving payment of water fund certificates out of the net earnings of the entire proceeds of the Water Department without allocation, so long as the outstanding obligations are paid without prejudice to the rights of prior issues.

In the case of *City of Jerseyville* v. *Connett*, 49 Fed. (2d) 246, on page 249, the Circuit Court of Appeals in recognizing and approving the Illinois Supreme Court rule, stated the following:

> "* * * But the Ward case is distinctly antagonistic to that part of the decision in the Joliet case where it is said that the pledging of the income from the old plant for the payment of water fund certificates issued for enlargement or extension constituted the certificates an indebtedness of the municipality within the constitutional provision."
>
> *Jerseyville* v. *Connett*, 49 Fed. (2d) 246, 249.

In the recent case of *Simpson* v. *City of Highwood*, 372 Ill. 212, on page 221, the Illinois Supreme Court has reaffirmed this principle:

> "The contention that the ordinance for the project and bond issue is void because it pledges property and income and, as such, involves an indebtedness in excess of the constitutional and statutory limitations, is answered adversely in *Maffit* v. *City of Decatur*, 322 Ill. 82, and *Ward* v. *City of Chicago*, 342 *id.* 167. In each of those cases, *the income from presently owned property, as well as that newly acquired, was*, by contract in the *Maffit* case, and by ordinance in the *Ward* case, to be put into a special fund and used to pay, in the *Ward* case, water revenue certificates, and in the *Maffit* case, the contracting water supply company." (Italics ours.)
>
> *Simpson* v. *Highwood*, 372 Ill. 212, 221.

It is manifest from the decisions of the Illinois Supreme Court, that the entire proceeds arising from the

operation of the water works system as a whole are subject to the payment of, first, the necessary operating expenses of such water works system, and, second, to the payment of the certificates issued and the interest accrued thereon. In the instant matter, as the undisputed evidence shows, the net earnings applicable to the payment of principal and interest of outstanding water fund certificates relating to both water works systems were more than enough to pay all matured principal and interest and have a substantial surplus after such payment. The surplus could have been, and should have been, applied to the retirement of unmatured certificates.

On page 17 of the petition counsel refers to the case of *People* v. *Orvis,* 374 Ill. 536. This case has no application to the instant matter. In a prior case entitled *People* v. *Orvis,* 358 Ill. 408, the Supreme Court of Illinois held that certain claims incurred by the school district in completing a school building and in furnishing equipment were in excess of the statutory debt limit and therefore illegal. Subsequently the Legislature sought to validate these claims. In the latter case (374 Ill. 536) the Supreme Court held that the Legislature had no power to validate debts which were invalid by reason of their exceeding the statutory debt limit. This question is obviously not present in the case at bar.

On page 18 counsel for petitioner states:

> "The court in its opinion misapprehends the language of the Act of 1899 and applies the Act as though the word system appears in the plural, whereas in fact, the word system appears in the singular throughout the body of the Act, and appears in the plural only in the title of the Act, where the words 'Cities, Villages and Towns' appear in the plural."

We submit that the Circuit Court of Appeals did not misapprehend the language of the Act of 1899 and in con-

struing the singular words followed the rules of construction as set forth in Chapter 131, Section 1, Illinois Revised Statutes, 1939. This chapter, entitled "Construction of Statutes", provides the general rules which shall be observed in the construction of all statutes now in force. Pertinent to the question raised by counsel are the following:

> "First—All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the Legislature may be carried out.
>
> "Second—Words in the present tense include the future.
>
> "Third—Words importing the singular number may extend and be applied to several persons and things and words importing the plural number may include the singular."

We respectfully submit that the construction placed upon the Act of April 22, 1899, by the Circuit Court of Appeals is the only reasonable and logical construction that can be made and is fully supported by the Illinois decisions referred to in the Circuit Court of Appeals' opinion.

II.

Respondent's reply to petitioner's proposition:

> *"A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits."*

Counsel for petitioner, in support of the proposition stated under this second point, relies primarily on the case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, and the case of *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101. The facts in these cases clearly dis-

tinguish them from the case at bar. In the case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, the Court, on page 639, stated the following:

> "The decision of the case on the merits requires construing Article 1112, *supra,* since the city contends *that the bonds are invalid because the issues were not submitted to and approved by a majority vote of the qualified electors thereof, but were authorized only by an ordinance of the city council.*" (Italics ours.)

Under Article 1112 the municipality was prohibited from encumbering the water system for more than $5,000 unless such encumbrance had been authorized by a majority of the qualified voters of the municipality. There were exceptions, however, which did not require the approval of a majority of the voters, and these exceptions were for "purchase money, or for extensions, or to refund any existing indebtedness".

The facts in the *Corpus Christi* case disclosed that the construction for which the bonds had been issued was for the purpose of improvements rather than extensions, and, therefore, were unauthorized unless approved by a majority of the qualified voters. Since there was no such approval, the Court held the bonds void. No such question is presented in the case at bar. The evidence shows, and there is no dispute about the fact, that the City of Harvey with meticulous care had followed the procedure set forth in the Act of April 22, 1899, authorizing the issuance of water fund certificates in payment of Water Works System No. 2. A history of the city's procedure is set forth in plaintiff's Exhibit 1 (Tr. 480-485). Furthermore, in the ordinance authorizing and providing for the refunding of the water fund certificates relating to Water Works System No. 1 and System No. 2,

passed by the City Council of the City of Harvey on the 25th day of January, 1937, the following appears in the recitals:

> "Whereas, *the City of Harvey, Illinois, did heretofore and prior to July 1, 1935, authorize, issue, sell and deliver in manner and form provided by law its water fund certificates of indebtedness* in the principal amount of $200,000, dated September 15, 1924, bearing interest at the rate of five per cent per annum, of which there are now outstanding and unpaid said water fund certificates in the total amount of $129,000 and interest accrued thereon since March 15, 1935; and
>
> "Whereas, *said City did also heretofore and prior to July 1, 1935, authorize, issue, sell and deliver, in manner and form provided by law, its water fund certificates of indebtedness* in the principal amount of $350,000, dated February 1, 1927, bearing interest at the rate of five and one-half per cent per annum, of which there are now outstanding and unpaid said water fund certificates of indebtedness in the total principal amount of $335,000 and interest accrued thereon since February 1, 1933." (Def. Ex. 2, Tr. 702.) (Italics ours.)

No distinction was made by the City of Harvey in describing the issue relating to Water Works System No. 1 and the issue relating to Water Works System No. 2. Both issues were declared to have been authorized, issued, sold and delivered as provided by law. At the time that ordinance was passed, and at all times, except for the purposes of this lawsuit, the City has always recognized the water fund certificates issued in payment of Water Fund System No. 2 to be legal, valid and binding obligations. Subsequent to the passage of the refunding ordinance, the City, as the record shows, has expended $65,000 of the water funds in the acquisition of these certificates, again affirming their validity (Tr. 701).

The refunding ordinance was passed on January 25, 1937, and on June 20, 1939, after this suit was pending, and, as a matter of fact, for the purpose of eliminating the Reconstruction Finance Corporation as a co-plaintiff in this litigation, $20,000.00 of the water fund certificates held by the Reconstruction Finance Corporation were purchased at the price of $22,000.00 by the diversion of water funds (Tr. 701). From these facts, the good faith of the petitioner in asserting that the water fund certificates are illegal is highly questionable.

The case of *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101, cited by petitioner, clearly demonstrates the rule which appellant relies upon but which has no application to the facts in the instant matter. In that case, Judge Sease of the Trial Court in his statement of the facts, on page 1104, said:

> "It appears from the testimony that in the early part of the year 1927 one Sidney M. Edelstein was in the City of Union as an industrial promoter and was endeavoring to locate a silk mill in the said city. The matter of the city council assisting in the location of such mill was taken up with the said council several times by the said Edelstein, as shown by the minutes of such council in evidence; the said minutes going back as far as January 10, 1927. Finally, at a meeting on April 28, 1927, the council accepted the plan as outlined by Mr. Edelstein 'that the City enter into a contract with him to execute notes for $45,000, payable at the expiration of twelve months in promotion of the aforesaid silk mill.'"

The decision of the Court was that there was neither constitutional nor statutory authority for a city to issue notes for the promotion of a private enterprise. On page 1109 the Court stated:

> "Now under the Constitution and laws of this state, a municipal corporation is authorized to issue

only two types of evidences of indebtedness: One, tax anticipation notes, as authorized by section 4554 of Civil Code (1922); and the other, bonds."

The Court then discusses the character of tax anticipation notes and of bonds, and comes to the conclusion that the notes issued do not come within either classification, and says, on page 1111:

"* * * that these attempted obligations were for *no corporate or public purpose* and were null and void." (Italics ours.)

Bolton v. *Wharton*, 163, S. C. 242; 86 A. L. R. 1101, 1104, 1109, 1111.

On appeal, the decision of the Court below was affirmed and Judge Sease's opinion was adopted.

There is obviously no analogy between the *Bolton* case and the case at bar. The water fund certificates issued by the City of Harvey were not only for a corporate purpose, but were authorized by the Act of April 22, 1899.

Petitioner has failed to cite a single Illinois Supreme or Appellate Court decision in support of its contentions that has any application to the issues decided by the Circuit Court of Appeals. On the other hand, the decision of the Circuit Court of Appeals is fully sustained by the Illinois authorities on every question presented. Furthermore, petitioner has failed to show that the water fund certificates issued in payment of Water Work System No. 1 have been impaired in any manner whatsoever so as to invoke the jurisdiction of this Court for the purpose of reviewing the decision of the Circuit Court of Appeals for the Seventh Circuit.

Water Works System No. 2 was constructed at a cost of $350,000 for which water fund certificates were issued. Out of the total net earnings, at least $355,732.07 is

allocable to Water Works System No. 2. Water Works System No. 2 is trust property and the earnings allocable to that system are trust funds, all of which have been pledged and are to be used for the payment of outstanding certificates. Certainly it would not be in furtherance of justice if the City of Harvey were permitted, by mere technical quibbling, to enrich itself to the extent of over $700,000 by taking Water Works System No. 2, representing an investment made in good faith by certificate holders in the sum of $350,000, and by keeping the sum of $355,832.07 collected as earned revenue trust funds, held for the benefit of the certificate holders, simply by the City declaring that it had no right to issue the certificates when, under the law and the facts, the City did have the right.

In the early case of *Burr* v. *City of Carbondale,* 76 Ill. 455, the court on page 469 stated the following:

> "The principle has always been acknowledged by this and other courts, that the acts of a municipality done under a power, and in substantial conformity to the power, are binding * * * * * *.
>
> "So, by parity of reasoning and analogy, if a municipal corporation, authorized by law, issue its bonds in furtherance of a corporate purpose, and in substantial compliance with the law authorizing their issue, and such bonds come into the hands of an innocent holder, even if there be irregularities not going to the power, the bonds must be held valid. If the power existed, the act is binding * * * * * *. Where the power to issue bonds existed, the corporation is estopped from setting up irregularities in the issue of the bonds after repeated payments of interest thereon."

On page 478 the Court concluded:

> *"No charge of fraud, combination or oppression is made. Every act seems to have been fairly done, and in pursuance of law. The disreputable feature*

of the case is, that the same authority doing all these acts, and whose city has received the benefit of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we cannot sanction it." (Italics ours.)

Burr v. *Carbondale*, 76 Ill. 455, 469, 478.

The Master, in his report, sustained the validity of the water fund certificates of indebtedness on the theory of estoppel. We believe that the issuance of the water fund certificates in payment of Water Works System No. 2 comes within the purview of the Act of April 22nd, 1899, and the validity of these certificates is not dependent upon the doctrine of estoppel. However, if there were some question as to any irregularity, the certificates having been authorized by statute, and the procedure for their issuance under the provisions of the Act of April 22nd, 1899, having been scrupulously observed by the City Council, the City of Harvey, in view of its conduct and its subsequent acts as hereinabove referred to, is obviously estopped to deny their validity.

In the case of *People ex rel.* v. *Maxon*, 139 Ill. 306, the Village of Colfax by its President and Board of Trustees attempted to pass an ordinance disconnecting certain territory which had formerly been within its boundaries. The ordinance received a majority of the votes of the members present, but not a majority of all of the members elect which was requisite under the statute. The ordinance, therefore, was never legally passed. It was, however, published and recognized as valid by the officers of the Village and the officers of the township in which the territory lay. The township took charge of the territory, levied taxes upon it, worked the roads, built a bridge, etc. The territory so attempted to be disconnected was recognized and treated by both the Village and township as not being a part of the

Village until the 5th day of August, 1889, when the President and Board of Trustees of the Village passed an ordinance levying a tax upon the real and personal property within its limit for corporate purposes. Demand was made upon Maxon, who was County Clerk, to extend the taxes and upon his refusal, a writ of mandamus issued to compel him to extend such taxes. No defense was made by Maxon, but the commissioners of highways of the township, by leave of court, became parties and set up the aforesaid facts relating to the township having taken over jurisdiction of the disconnected territory. The lower court gave judgment for the defendants. The Appellate Court affirmed the judgment, holding that the Village was estopped to deny the validity of said ordinance under the decisions of the Supreme Court, citing *Chicago, Rock Island & Pacific Railroad Company* v. *Joliet,* 79 Ill. 25, and *Lee* v. *Mound Station,* 118 Ill. 304. On appeal to the Supreme Court the Appellate Court judgment was affirmed, and on page 310 the Court stated:

> "We entertained no doubt that on the authorities cited by the Appellate Court, as well as upon reason and justice, the Village is estopped from claiming any power over the territory in question, as being within its limits."
>
> *People* v. *Maxon,* 139 Ill. 306, 310.

The rule announced in *People* v. *Maxon, supra,* was reasserted in the case of *Webster* v. *Toulon School District,* 313 Ill. 541, 548.

The Circuit Court of Appeals in *Bank of Burlington* v. *Murphysboro,* 96 Fed. (2d) 899, on page 904, stated:

> "* * * we are of the opinion that *the trustee municipality is estopped to set up its own wrongdoing to justify its refusal to account for and pay over trust funds which it has collected for the benefit of*

the claimant, who, in equity and good conscience, is entitled to be paid." (Italics ours.)

Burlington v. *Murphysboro,* 96 Fed. (2d) 899, 904.

This same rule was applied by the Appellate Court of the State of Illinois in the case of *Cook* v. *City of Staunton,* 295 Ill. App. 111. On page 118, the Court stated:

"The discrepancies in the issuing of the bonds and the failure to comply strictly with the provisions of the statute, as pointed out by appellant, are at most irregularities which might be taken advantage of by one against whose property a special assessment was levied, *but not by the city issuing the bonds that wilfully or negligently failed to apply toward the discharge of its obligations the funds collected by it for that purpose.* There is a distinction between contracts which are *ultra vires* and contracts which are within the power of the city to make but which have been irregularly or illegally made but have been performed in good faith. *Notwithstanding such irregularities in the issuing of the bonds the city has collected the assessments levied with which to pay said bonds and interest thereon, and paid in full all of the bonds of the first six series, and none are outstanding, and is estopped to set up as a defense in a suit instituted for the collection of such bonds as are outstanding its own irregularities in the execution of a power clearly granted it.*" (Italics ours.)

Cook v. *City of Staunton,* 295 Ill. App. 111, 118.

Chicago v. *McGovern,* 226 Ill. 403.

McGovern v. *Chicago,* 281 Ill. 264, 280.

CONCLUSION.

It is manifest from the record in this case that the petitioner, the City of Harvey, has shown no legal grounds entitling it to a review, by this court, of the decision of the Circuit Court of Appeals for the Seventh Circuit.

WHEREFORE, respondent respectfully prays that the application for writ of certiorari be denied.

Respectfully submitted,

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